RECORD
AND
BRIEFS

No. 16-1466

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IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET. AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CATO INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Twice in the past five years this Court has explicitly questioned its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014); *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012). Last term this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1033 (2016).

This case presents the same question presented in *Friedrichs*: Should *Abood* be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment? *Amici* focus on the embedded issue of whether *stare decisis*—which applies less rigidly in constitutional cases—should prevent the Court from overruling *Abood*.

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

This case concerns *amici* because it implicates the government's ability to burden private citizens' First Amendment rights. Specifically, all aspects of public-employee union activity are inherently political, with necessary ramifications for basic questions of public policy and state budgets. Workers—let alone nonunion members—do not all agree on these important issues.

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[1] Rule 37 statement: All parties filed blanket consents with the clerk and were timely notified. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Illinois law mandates that public-sector workers like Mark Janus pay money for union collective-bargaining activities that they do not support. 5 Ill. Comp. Stat. 315/1 et seq. These government-compelled exactions—"agency fees"—give these workers a Hobson's choice: Either sacrifice your First Amendment rights and fund political advocacy you may not like, or find another job. This Court allowed that practice in *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), but has since recognized problems with *Abood* and made clear that the case is in serious constitutional doubt. *Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014); *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

This brief addresses one alleged impediment to the Court's finally correcting the *Abood* mistake: whether the doctrine of *stare decisis* should trump the First Amendment rights of public-sector workers. It should not. When constitutional rights are violated, *stare decisis* is at its weakest. Moreover, the prudential policy factors the Court considers when applying the doctrine weigh in the favor of overturning *Abood*. The Court should take this case and reinstitute the constitutional protections against compelled speech and association.

ARGUMENT

STARE DECISIS IS NOT AN IMPEDIMENT TO OVERRULING *ABOOD*

A. *Stare Decisis* Is at Its Lowest Ebb When Constitutional Rights Are Abridged

Stare decisis is a "principle of policy" that promotes prudential considerations such as the "evenhanded,

predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). This policy rationale stretches back to common law; in Blackstone's words, *stare decisis* "keep[s] the scale of justice even and steady." 1 Commentaries 69 (Univ. of Chicago Press 1979) (1765). But this Court has recognized that *stare decisis* is not an "inexorable command" to be blindly followed. *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citations omitted). And it is not to be applied as a "mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

Stare decisis is especially questionable when constitutional rights are at stake. As Justice Louis Brandeis noted long ago, "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis J. dissenting) (footnotes omitted). Unlike private-property cases, where "stability may trump perfect correctness" due to "the importance of preserving settled expectations," "in constitutional cases, the value of correct reasoning may trump stability given the difficulty of making changes to a constitutional precedent." Bryan A. Garner *et al.*, *The Law of Judicial Precedent* 352 (2016)); *see also, Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring); *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result) ("The doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law").

But more important than the procedural hurdles that come with correcting past wrongs in constitutional cases, judges can simply get the substance of the law wrong. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010); *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003); *Baker v. Nelson*, 409 U.S. 810 (1972), overruled by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Indeed, Blackstone recognized "that the law, and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law." 1 Blackstone, Commentaries 71; *see also* 1 James Kent, Commentaries on American Law 477 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989) ("I wish not to be understood to press too strongly the doctrine of *stare decisis*...It is probable that the records of many of the courts in this country are replete with hast and crude decisions; and such cases ought to be examined without fear; and revised without reluctance.").

And when past judges or courts get the law wrong, current judges and courts have a duty to correct those mistakes. Judges are not the source of constitutional law, the Constitution is. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Although "judges in a real sense 'make law' . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law is, rather than decreeing what it is today *changed* to, or what it will tomorrow be.") (Scalia, J., concurring in the judgment) (emphasis in the original); *Jones v. Randall*, 98 Eng.

Rep. 706, 707 (1774) ("Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of law.").

As Justice Stanley Reed explained before taking his seat on the Court:

> [T]he doctrine of *stare decisis* has a philosophic necessity in the common law system which is not found elsewhere. The other systems apply a written document to the concrete controversies which come before the court. . . .The judge who applies a section of a civil code, a constitution or a statute, must always measure the decisions of his predecessors against the document which they were interpreting. However high the authority of the prior decisions, they remain inferior to the law itself.

Address by Solicitor General Stanley Reed at the Meeting of the Pennsylvania Bar Ass'n, transcript at 133 (Jan. 7, 1938) (on file with Cornell L. Rev.). Justice William O. Douglas echoed this view years later, calling *stare decisis* in constitutional cases "tenuous": "[A judge] may have compulsions to revere past history and accept what was once written. But he remembers above all that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." William O. Douglas, "Stare Decisis" (1949), in *Essays on Jurisprudence from the*

Columbia Law Review 18-19 (1963).[2] Thus, "[w]hen considering whether to reexamine a prior erroneous holding, [this Court] must balance the importance of having constitutional questions decided against the importance of having them decided right[,]" *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring), by looking first to the text, structure, and history of the Constitution and only then confirming that the prior precedent was correctly decided.[3]

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[2] This point was forcefully made by the Pennsylvania Supreme Court in 1787:

> A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law. Acting otherwise would have this consequence; because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also.

Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (1786); *see also* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 408 (1988).

[3] A more rigid adherence to *stare decisis* in constitutional cases—which ignores the law to blindly apply precedent—may well run afoul of Article III and the Constitution's Due Process Clauses. *Cf. Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (noting that the judicial power requires a court to "exercise its independent judgment in interpreting and expounding upon the laws.") (Thomas, J., concurring); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1012 (2003) ("[T]he preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality.").

B. The Court Should Overrule *Abood* Because Collective-Bargaining Agency-Fee Exactions Violate the First Amendment Rights of Government Workers

This Court "has not hesitated to overrule decisions offensive to the First Amendment." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (citation omitted). Indeed, the Court has overturned no fewer than eight precedents in the free-speech context alone:

- *Brandenburg v. Ohio*, 395 U.S. 444 (1969), overruling *Whitney v. Calif.*, 274 U.S. 357 (1927);
- *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940);
- *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976), overruling *Valentine v. Chrestensen*, 316 U.S. 52 (1942);
- *Miller v. California*, 413 U.S. 15 (1973), overruling *Roth v. United States*, 354 U.S. 476 (1957);
- *Hudgens v. NLRB*, 424 U.S. 507 (1976), overruling *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); and
- *Citizens United v. FEC*, 130 S. Ct. 876 (2010), overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. FEC*, 540 U.S. 93 (2003).

There is a good reason this Court has not hesitated to correct erroneous constitutional decisions: "If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what

shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. *Abood* should be no exception to this fixed star.

This Court has made it clear that the First Amendment does not allow government majorities to compel people to subsidize speech or associations they disagree with—at least not without a narrowly tailored compelling interest. *Harris*, 134 S. Ct. at 2644 (It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."); *see also Knox*, 132 S. Ct. at 2289 (Compelled speech and association must serve a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.") (citation omitted); *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government," and thus "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (citations omitted); *Citizens United*, 558 U.S. at 340 ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.") (citation omitted).

Nevertheless, the Court in *Abood*, despite the long and growing list of precedents holding otherwise, ratified compelled political speech The *Abood* Court upheld the exaction of agency fees despite acknowledging

that core political speech is inexorably intertwined with the negotiations that take place between public-sector unions and government. "[T]here can be no quarrel with the truism," wrote Justice Potter Stewart, that collective bargaining by "public employee union's attempt[s] to influence government policymaking," and thus, "their activities—and the views of members who disagree with them—may be properly termed political." *Abood*, 431 U.S. at 231. *Abood* also recognized that collective bargaining necessarily involves taking sides on a plethora of "ideological" issues, such as the "right to strike," "medical benefits," and whether "unionism itself" is good policy. *Id.* at 222. These topics all touch on "political" speech designed to influence governmental policy-making about "ideological" issues. *Id.* at 235.

The Court's reasoning faltered by not fully connecting the dots between collective-bargaining lobbying and non-collective-bargaining lobbying. That is simply a distinction without a difference in the public sector. Indeed, as the Court later noted, a "public sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. Moreover, collective bargaining over "wages and benefits" is "a matter of great public concern," and any "contrary argument flies in the face of reality." *Harris*, 134 S. Ct. at 2642-43.

The *Abood* Court should have applied heightened scrutiny to any rationale that would overcome the individual right to be free from compelled speech and association, but it did not. *See Abood*, 431 U.S. at 262-264 (Powell, J., concurring in the judgement); *accord id.* at 242-44 (Rehnquist, J., concurring). The Court should now apply heightened scrutiny and find that

the "free rider" and "labor peace" rationales applied by *Abood* simply do not hold up to any First Amendment scrutiny. *See Harris*, 134 S. Ct. at 2627 ("*Abood* is something of an anomaly. . . . The primary purpose of permitting unions to collect fees . . . is to prevent nonmembers from free-riding on the union's efforts . . . But [s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections.)" *See also* Pet. Brief 21-30.

In sum, *Abood* is a badly reasoned anomaly of this First Amendment jurisprudence and should be overruled. *Cf. Alleyne v. United States*, 132 S. Ct. 2151, 2167 (2013) (Breyer, J., concurring in part and in judgment). Public-sector union agency fees force nonconsenting, nonunion members to subsidize unions' political point of view. *Stare decisis* should not prevent this Court from overturning such a blatant, continuous violation of the free speech and association rights of millions of government workers throughout the country.

C. This Court Should Overrule *Abood* Because There Is No Reliance on It and It Is Unworkable

It should be enough for this Court that *Abood* "was badly reasoned and produces erroneous (in this case unconstitutional) results." *Arizona v. Gant*, 556 U.S. 332 (2009) (Scalia, J., concurring) (overturning a nearly 30-year-old precedent concerning the warrantless search of a vehicle incident to arrest). But to the extent this Court has adopted other "special justifications" for abandoning precedent—which should matter less in constitutional cases—those factors weigh in favor of overturning *Abood*.

1. There is no "reliance" on *Abood*.

Abood has not gained the reliance interest which *stare decisis* protects. While it is true that in "cases involving property and contract rights," *stare decisis* plays an important role, *Burnett*, 285 U.S. at 406-08, those considerations are lacking in the context of public-sector union agency fees. As the Court recognized in *Knox*, overruling *Abood* would simply deprive unions of the "the 'extraordinary' benefit of being empowered to compel nonmembers to pay for services that they may not want and in any event have not agreed to fund." *Knox*, 132 S. Ct. at 2295.

Moreover, a "union has no constitutional right to receive any payment from . . . [non-consenting, nonmember] employees." *Id.*; *see also* Pet. Brief 21. Indeed, no person relies on being forced into an association that requires him or her to fork over the fruits of their labor to have a union advocate views with which they disagree. In other words, no one is relying on having fewer First Amendment freedoms. *See Lawrence*, 539 U.S. at 577; *see also* Ilya Shapiro and Nicholas Mosvick, *Stare Decisis after Citizens United: When Should Courts Overturn Precedent*, 16 Nexus: Chap. J.L. & Pol'y 121, 135 (2010/2011). And, of course, unions do not rely on the availability of agency fees in any legal or institutional sense; they know perfectly well how to function without them because they do so in the states (about half of them) that don't allow these fees.

2. *Abood* is "unworkable."

The line between collective-bargaining lobbying and any other type of lobbying is indistinguishable in the public-sector-union context. In *Harris*, the Court cited a long line of cases that showed *Abood* "failed to

appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Harris*, 134 S. Ct. at 2632. Indeed, the line-drawing that *Abood* attempted to make did not "[anticipate] the magnitude of the practical administrative problems" that such constitutional line drawing creates. *Id.* at 2633.

The Court attempted to make sense of the line-drawing in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), but seemed only to muddy the waters even more. As Justice Scalia noted in his *Lehnert* opinion, *Abood* line-drawing "provides little if any guidance to parties contemplating litigation or to lower courts," and "does not eliminate past confusion" about what is collective barging and what is political lobbying. *Id.* at 551 (Scalia, J., concurring in judgement in part and dissenting in part). This is for a good reason: it is almost impossible to tell the difference.

For example, as Justice Thurgood Marshall pointed out in *Lehnert*, the plurality's balancing test "would permit lobbying for an education appropriations bill that is necessary to fund an existing collective-bargaining agreement, but it would not permit lobbying for the same level of funding in advance of the agreement, even though securing such funding often might be necessary to persuade the relevant administrators to enter into the agreement." *Lehnert*, 500 U.S. at 537 (Marshall, J. dissenting in part). Thus, the arbitrary line between "increased funding for education," a non-chargeable union expenditure, and "ratification of a public-sector labor contract," a chargeable union expenditure, is nebulous at best, fanciful at worst. *Id.* at 538. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)

(emphasizing that "judicial action must be governed by [judicially manageable] standard[s]," and that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."). No one should have to have their constitutional rights to speech and association treated like playdough through such subjective "judgment calls." *Id.* at 551 (Scalia, J., concurring in judgment in part and dissenting in part).

CONCLUSION

Abood has caused serious infringement of people's core constitutional rights for over 40 years. In that time, millions of public workers have had millions of dollars taken from them to further causes that they do not wish to support. This Court should take this case and confirm that prudential standards of *stare decisis* do not "outweigh the countervailing interest that all individual share in having their constitutional rights fully protected." *Gant*, 556 U.S. 332, 349. The public workers of this country deserve to have their First Amendment liberty protected.

Respectfully submitted,

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